

1 Patrick S. Thompson (SBN 160804)
2 *pthompson@goodwinprocter.com*
3 Anna Hsia (SBN 234179)
4 *ahsia@goodwinprocter.com*
5 Audrey M. Lin (SBN 271671)
6 *alin@goodwinprocter.com*
7 **GOODWIN PROCTER LLP**
8 Three Embarcadero Center, 24th Floor
9 San Francisco, California 94111
10 Tel.: 415.733.6000
11 Fax: 415.677.9041

12 *Attorneys for Defendant*
13 *Twilio, Inc., a Delaware Corporation*

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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION**

BRIAN GLAUSER, individually and on behalf
of all others similarly situated,

Plaintiff,

v.

TWILIO, INC., a Delaware corporation,
GROUPME, INC., a Delaware corporation,

Defendants.

Case No. CV11-2584 PJH

**REPLY IN SUPPORT OF TWILIO, INC.'S
MOTION TO DISMISS FIRST AMENDED
CLASS ACTION COMPLAINT**

Date: January 25, 2012

Time: 9:00 a.m.

Courtroom: 3

Judge: Hon. Phyllis J. Hamilton

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1 **I. INTRODUCTION**

2 Plaintiff asks this Court to expand liability under the Telephone Consumer Protection Act
3 (“TCPA”) far beyond its intended scope. Under plaintiff’s legal theory, any company involved in
4 any way with transmitting an alleged unsolicited text message would be liable under the TCPA.
5 Plaintiff’s theory would find that the carriers, handset makers, intermediate routers, and many
6 more companies were “makers” of a text message if they appear anywhere in the path of a
7 particular text message. Plaintiff cites no case law for this broad theory of liability because there
8 is none.

9 Plaintiff responded to Twilio’s original motion to dismiss by filing the First Amended
10 Complaint (“FAC”). As Twilio observed in its motion to dismiss the FAC, plaintiff did not and
11 cannot cure the deficiencies in his putative class action against Twilio. Given the deficient
12 allegations in the FAC, plaintiff cannot state a claim against Twilio under the TCPA. The Court
13 should find that further amendment would be futile and dismiss the FAC with prejudice because
14 plaintiff already has had two bites at the apple and has been unable to cure the deficiencies in his
15 claims.

16 The TCPA restricts the use of automated telephone equipment to make random
17 solicitations using artificial or prerecorded voices. As Twilio observed in its opening brief, neither
18 the Federal Communications Commission (“FCC”) nor the courts have held telephone companies
19 or fax broadcasters liable under the TCPA unless a plaintiff alleges the provider had heavy
20 involvement in controlling the content or recipients of a call or fax, and that the provider had
21 actual knowledge that its services were being used for an unlawful purpose. That same reasoning
22 extends to text messages, also known as short message service (“SMS”) calls. Plaintiff’s
23 opposition fails to address that fundamental point.

24 Plaintiff’s opposition tortures the principle of plain meaning to support the contention that
25 Twilio “makes” the calls in controversy, then offers an extensive analysis of why Twilio is not a
26 common carrier and therefore not subject to any exemption from the TCPA. Plaintiff’s arguments
27 miss the point. Plaintiff does not allege that Twilio makes calls in any sense that is different from
28

1 telephone providers such as AT&T, Verizon or Sprint. Indeed, plaintiff introduces evidence that
2 Twilio operates as a Voice over Internet Protocol (“VoIP”) provider. According to the FCC, such
3 providers simply use a software application, instead of telephone lines, to allow consumers to
4 make voice calls or send text messages. Twilio passes along messages created by its customer’s
5 customers (i.e., GroupMe’s customers) to recipients who are identified and selected by GroupMe’s
6 customers, not Twilio. Plaintiff does not cite any case, regulation or administrative decision
7 holding a common carrier, fax broadcaster, VoIP or other messaging service providers liable under
8 the TCPA where the provider has only transmitted a call or text message created by a third party,
9 and sent to someone identified by that third party.

10 Plaintiff tries to get around the pleading requirements by claiming that Twilio enters into
11 service contracts with third parties, so it has a greater degree of control. The existence of a
12 contract does not support a plausible inference of actual knowledge. Telephone companies
13 routinely enter contractual service agreements with their customers, large and small. By plaintiff’s
14 reasoning, any major telephone service provider that contracts with a business customer would be
15 ascribed actual knowledge and control over the calls and messages transmitted for that business.

16 Plaintiff also contends that it need only allege the capacity to store telephone numbers to
17 be called using a random or sequential number generator. But that argument is unavailing because
18 plaintiff admits that the numbers are not random. Indeed, plaintiff states in the FAC that
19 individual consumers that subscribe to GroupMe enter the recipient’s name and telephone number.
20 Plaintiff also alleges that the subscribers to GroupMe’s service identify the intended message
21 recipients and transmits that information to GroupMe, which then transmits it to Twilio. Thus, the
22 numbers are neither random nor sequential. Given these incurable deficiencies, the Court should
23 dismiss the FAC.

24 If the Court does find that the pleadings are adequate, the matter should be referred to the
25 FCC. Curiously, plaintiff contends that the FCC lacks jurisdiction over Twilio and its
26 transmission of messages. If that were true, then the FCC could not have adopted the
27 implementing regulations that plaintiff claims extends potential liability to Twilio or similar

1 providers under the TCPA in the first place. As set forth in Twilio’s motion to dismiss, the FCC is
2 currently considering a petition regarding that precise issue, thus obliging the Court to invoke
3 primary jurisdiction. Nowhere in plaintiff’s opposition does he dispute that application of the
4 factors relevant to primary jurisdiction weighs in favor of referring this case to the FCC if this case
5 is not dismissed.

6 **II. PLAINTIFF FAILS TO STATE A CLAIM AGAINST TWILIO**

7 **A. Plaintiff Fails to State a TCPA Violation Because He Alleges that Twilio**
8 **Functions Like Entities Exempt from the TCPA**

9 Twilio demonstrated in its opening brief that the Court should dismiss the FAC with
10 prejudice because plaintiff alleges that Twilio merely transmits the text messages in controversy.
11 Based on plaintiff’s allegations, Twilio functions like telephone common carriers and fax
12 broadcasters—entities that are exempt from the TCPA. In response, plaintiff contends that Twilio
13 does not in fact function like telephone common carriers, because Twilio is a VoIP provider.
14 Plaintiff further seeks judicial notice of a Form 499 printout showing Twilio as a VoIP provider.
15 See Plaintiff’s Corrected Response in Opposition to Defendant Twilio, Inc.’s Motion to Dismiss
16 the Amended Complaint (“Opposition” or “Opp.”), at 11 n.3, Dkt. #65. In doing so, plaintiff
17 succeeds only in demonstrating how Twilio operates identically to telephone common carriers. As
18 defined by the FCC, VoIP is an alternative to a regular telephone line: VoIP “is a technology that
19 allows you to make voice calls using a broadband Internet connection instead of a regular (or
20 analog) phone line.”¹ Like telephone common carriers that transmit telephone calls or text
21 messages made by others, Twilio merely transmits text messages created by others. Twilio
22 transmits messages received from GroupMe, and GroupMe’s customers make all decisions about
23 what text messages are created and the telephone numbers to which all of these text messages are
24 directed. Just as is the case with companies like Verizon and other providers, Twilio has no TCPA
25 liability for the decisions of its customer’s customers (i.e., GroupMe’s customers).

26
27 ¹ See Federal Communications Commission, Voice-Over-Internet-Protocol,
28 <http://transition.fcc.gov/voip/> (last visited Nov. 15, 2011).

1 Plaintiff also argues that Twilio does not function like a common carrier because Twilio
2 does not need to provide emergency dialing services or disability access requirements. Opp. at 23-
3 24. Whether Twilio is in fact a common carrier or obligated to comply with common carrier
4 obligations is irrelevant. The issue here is that plaintiff has not alleged facts sufficient to establish
5 that Twilio does anything more than transmit messages created by third parties and directed to
6 recipients identified by those third parties.

7 Plaintiff argues in the Opposition that Twilio does not “simply provide transmission
8 facilities that are used to transmit others’ unsolicited [text message calls].” Opp. at 11. But there
9 is no substance to this argument. Plaintiff does not allege in the FAC what Twilio supposedly
10 does beyond merely transmitting messages. In particular, plaintiff does not allege that Twilio
11 creates the messages, controls the content of the messages, or identifies the recipients of the text
12 messages in controversy.² As such, plaintiff has failed to allege anything in Twilio’s transmission
13 of the text messages in controversy that differs from the role played by a telephone service
14 provider in the transmission of SMS.³

15
16 ² Plaintiff further argues that Twilio “actively solicits advertisers like GroupMe and reviews the
17 content of the text message calls it transmits.” Opp. at 11. The claim that Twilio “reviews the
18 content of the text message calls it transmits” was never raised in the FAC and should be
19 disregarded by the Court. *See Tietsworth v. Sears*, 720 F. Supp. 2d 1123, 1145 (N.D. Cal. 2010)
20 (“[i]t is axiomatic that the complaint may not be amended by briefs in opposition to a motion to
21 dismiss”) (citations omitted).

22 ³ Plaintiff’s contentions that Twilio does not operate like fax broadcasters similarly fail. Opp. at
23 12. Twilio does not contend that it is a fax broadcaster. Twilio contends that plaintiff alleges
24 only that Twilio operates exactly like a fax broadcasters, because Twilio controls neither the
25 content nor the recipients of text messages. Just like the fax broadcaster that sends facsimiles on
26 behalf of others for a fee, Twilio sends text messages on behalf of others for a fee. Plaintiff cites
27 to *Texas v. American Blastfax, Inc.*, 121 F. Supp. 2d 1085 (W.D. Tex. 2000), presumably
28 contending that Twilio functions more like the *Blastfax* defendant, where the court denied a
motion to dismiss. Opp. at 11. But in *Blastfax*, plaintiff alleged that defendant was “more than a
common carrier or service provider” because Blastfax “maintain[ed] and use[d] a database of
recipient fax numbers, actively solicit[ed] third party advertisers and presumably review[ed] the
content of the fax advertisements it sen[t].” *Id.* at 1089. The facts in that case are not analogous
to those alleged in the FAC where plaintiff alleges that the GroupMe user identifies all text
message recipients, and that the messages are created by those users and sent to the recipients
that they have identified. Nowhere in the FAC does plaintiff allege that Twilio actually reviews
the content of any text messages transmitted.

1 **B. Plaintiff Fails to Plead Around His Concession That Twilio Functions Like**
2 **Entities Exempt From the TCPA**

3 Unable to refute the admission that Twilio operates exactly like entities exempt from the
4 TCPA, plaintiff argues that Twilio is liable under the TCPA because (1) Twilio is the “maker” of
5 text message calls; (2) Twilio employed an auto-dialer, capable of randomly dialing recipients;
6 and (3) Twilio had actual notice of illegality. All three contentions fail.

7 1. Plaintiff Fails to State a TCPA Violation Because He Fails to Allege that
8 Twilio “Made” the Text Message Calls

9 To be liable for a TCPA violation, plaintiff must sufficiently allege that Twilio “made” the
10 text message calls at issue. 47 U.S.C. § 227(b)(1)(A)(iii). As set forth in Twilio’s motion to
11 dismiss, plaintiff alleged only that Twilio acted as a mere conduit for the transmission of text
12 messages made by others. Memorandum of Points and Authorities in Support of Twilio, Inc.’s
13 Motion to Dismiss First Amended Class Action Complaint (“Mot.”) at 3-4, Dkt. #46-1. Plaintiff
14 contends that Twilio “made” the text message calls, urging the Court to adopt the “ordinary and
15 natural meaning” of the word “makes.” Opp. at 8. Plaintiff contends that the person or entity who
16 “makes” or “initiates” a text message call is the one who “commences, starts, or introduces” the
17 call. Opp. at 8.

18 Twilio agrees that the Court should apply the plain language meaning of the TCPA. Using
19 plain language, it is the GroupMe user who makes the call, not Twilio. According to the
20 Opposition, the “maker” of a telephone call is the “person or entity [who] dials the number.” Opp.
21 at 9. According to the FAC, the GroupMe user authored the text messages in dispute and sent
22 those text messages to recipients of their own choosing. FAC at ¶¶ 10, 12, Dkt. #34. Thus, it is
23 GroupMe’s customer who “commenced, started, or introduced” the call.

24 Any other reading of the statute would lead to absurd results. Plaintiff argues that, without
25 Twilio, “GroupMe would have no way of making the text messages at issue.” Opp. at 9. But text
26 messages cannot be made without telephones, cellular service providers, handsets, or a computer.
27 Under plaintiff’s theory, any service provider or equipment manufacturer could be the “maker” of
28 the message. Plaintiff cites no authority for such a broad extension of potential liability under the

1 TCPA.

2 2. Plaintiff Fails to State a TCPA Violation Because He Fails to Allege that
3 Twilio Used Automatic Telephone Dialing Equipment

4 Plaintiff does not, and cannot, plead facts sufficient to give rise to a plausible inference that
5 the text messages made here were transmitted through an automatic telephone dialing system
6 (“ATDS”). ATDS has the capacity to “store or produce telephone numbers to be called, using a
7 random or sequential number generator” and to “dial such numbers.” 47 U.S.C. § 227(a)(1).
8 Given the allegations in the FAC, there is nothing random about the text messages in question.
9 Plaintiff admits that it is the GroupMe user who identifies “up to twenty-four recipients, and
10 provides the full names and cellular telephone numbers of each proposed [recipient].” FAC ¶ 12.
11 As alleged by plaintiff, Twilio does not choose any recipients, either intentionally or randomly.
12 FAC ¶¶ 12, 17. Those decisions are made by the GroupMe user. Thus, plaintiff cannot claim that
13 Twilio used any “random or sequential number generator” to send unsolicited messages to random
14 groups of people. Indeed, such allegations would contradict the existing factual allegations in the
15 FAC.

16 Needless to say, none of the cases in the Opposition support liability in the factual
17 circumstances alleged in the FAC. Plaintiff relies on *Kramer v. Autobytel, Inc.*, but in *Kramer*,
18 plaintiff alleged that defendants “used lists of thousands of cellular numbers of consumers
19 acquired from third parties.” 759 F. Supp. 2d 1165, 1168 (N.D. Cal. 2010). In *Kazemi v. Payless*
20 *Shoesource Inc.*, plaintiff alleged receiving “impersonal” text messages sent “en masse.” 2010
21 WL 963225, at *2 (N.D. Cal. Mar. 16, 2010). Likewise, in *Abbas v. Selling Source, LLC*, plaintiff
22 alleged receiving text messages from “an institutional sender without any personalization” and that
23 there was no reason to receive the messages “aside from telemarketing purposes.” 2009 WL
24 4884471, at *3 (N.D. Ill. Dec. 14, 2009). Here, in stark contrast, plaintiff alleges that a GroupMe
25 customer sent personalized text messages to no more than twenty-four recipients identified by that
26 GroupMe user. FAC ¶¶ 10, 12.

1 3. Plaintiff Fails to State a TCPA Violation Because He Alleges No Facts
2 Sufficient to Support Any Inference That Twilio Had “Actual Notice” of
3 TCPA Violations

4 To state a viable TCPA claim, plaintiff must allege facts sufficient to show that Twilio (1)
5 controlled who received text messages; (2) controlled the content of the advertisements; and/or (3)
6 had actual notice of illegality. *In the Matter of Rules and Regulations Implementing the TCPA of*
7 *1991*, 7 FCC Rcd. 8752, 8779-80 (Oct. 16, 1992) (quoting 2 FCC Rcd. 2819, 2820 (May 15,
8 *1987)); see also Rules and Regulations Implementing the Telephone Consumer Protection Act*
9 *(TCPA) of 1991*, 68 FR 44144-01, 44169 (July 25, 2003). Plaintiff entirely ignores the first two
10 prongs, thereby conceding that he cannot plead around allegations that GroupMe users controlled
11 the content and the recipients of the text messages.

12 Plaintiff argues that he sufficiently alleged “actual notice” because Twilio enters into
13 private contracts with third parties. Plaintiff argues that Twilio is different from telephone
14 common carriers and “is in a far better position to understand how its customers are using it to
15 make text message calls.” Opp. at 14. That argument fails for two reasons. First, traditional
16 telephone companies also enter into third party contracts. That does not provide a basis for an
17 inference of actual knowledge. *See In the Matter of Enforcement of Prohibitions Against the Use*
18 *of Common Carriers for the Transmission of Obscene Materials*, 2 FCC Rcd. 2819, 2820 (May
19 *15, 1987)* (recognizing that it would be “unlikely that a telephone common carrier will ever
20 possess sufficient knowledge of an illegal use of its facilities to be held liable therefore under
21 section 223(b).”). Second, plaintiff’s attenuated analysis reveals the principal, uncorrectable flaw
22 in the FAC: Nowhere does plaintiff allege that Twilio had actual knowledge that GroupMe was
23 using Twilio’s services for illegal purposes.⁴ To state a claim, plaintiff must make the direct
24 allegation of “actual notice of an illegal use.” *See id.* Considering plaintiff’s allegation that
25 GroupMe markets its “group texting” service to allow individual GroupMe users to create groups
26 of up to twenty-four people of their own choosing (FAC ¶¶ 10-12), Twilio could reasonably and

27 ⁴ Telephone companies, which are generally exempt from the TCPA, enter into contracts with
28 third parties. But plaintiffs would not contend that entering into a private contract would nullify
 any exemption from TCPA liability granted to telephone companies.

1 correctly assume that GroupMe was promoting a service that permits friends and relatives to
2 communicate with each other quickly, efficiently and lawfully. Plaintiff does not and cannot make
3 any reasoned argument to support an inference that Twilio had actual knowledge of illicit conduct.

4 **C. The FAC Should be Dismissed With Prejudice**

5 Plaintiff does not dispute that the Court has broad discretion to dismiss the FAC with
6 prejudice because this is his second attempt at pleading a viable claim. *Miller v. Yokohama Tire*
7 *Corp.*, 358 F.3d 616, 622 (9th Cir. 2004) (where plaintiff has previously amended, the court's
8 discretion to deny leave to amend is "particularly broad") (citation omitted). Plaintiff does not
9 address Twilio's arguments that plaintiff cannot plead around the following deficiencies of the
10 FAC: (1) plaintiff cannot amend the FAC to allege that Twilio operated as anything more than a
11 software platform through which others can send text messages; (2) plaintiff cannot amend the
12 FAC to allege that Twilio controlled who received text messages; (3) plaintiff cannot amend the
13 FAC to allege that Twilio controlled the content of the text messages; and (4) plaintiff cannot
14 amend the FAC to allege that Twilio had "actual notice" of illegality. *See* Mot. at 6-7.

15 Plaintiff has not and cannot cure the deficiencies of the original complaint he voluntarily
16 amended. Accordingly, the FAC should be dismissed with prejudice.

17 **III. IF THE COURT DECLINES TO DISMISS THE COMPLAINT, THE COURT**
18 **SHOULD REFER THE MATTER TO THE FCC**

19 If the Court declines to dismiss the FAC, the Court should refer this matter to the FCC, as
20 the FCC is considering a petition regarding the precise issues of this case. Plaintiff argues that the
21 Court should not invoke primary jurisdiction because the statute does not give the FCC authority
22 to regulate entities like Twilio. Opp. at 16-25. Plaintiff's arguments are unpersuasive for three
23 reasons.

24 First, plaintiff asserts that the FCC lacks jurisdiction because the statute does not give the
25 FCC authority to regulate entities like Twilio. Opp. at 17. Applying plaintiff's strict
26 constructionist reasoning, the Court should dismiss the claims outright because the plain text of
27 the TCPA does not extend to text messages at all. Text messages are not included in the definition
28 of the term "calls" under the statute, so plaintiff cannot state a claim. 47 U.S.C. § 227.

1 Second, if plaintiff contends that text messages are subject to the TCPA, then his
2 contention that the FCC cannot generally regulate companies that transmit text messages does not
3 make any sense. Plaintiff's entire case arises out of the FCC exercising its mandate to interpret
4 and enforce the TCPA. 47 U.S.C. § 227(b)(2) ("The Commission shall prescribe regulations to
5 implement the requirements of this subsection."). Pursuant to that mandate, the FCC ruled that the
6 TCPA's definition of "call" would include "both voice calls and text calls." *See Rules and*
7 *Regulations Implementing the TCPA of 1991*, 68 F.R. 44144-01, 44165 (July 25, 2003). The
8 Ninth Circuit approved of the FCC's authority to interpret and enforce the TCPA when it applied
9 the FCC's finding that the TCPA covers text messages. *See Satterfield v. Simon & Schuster, Inc.*,
10 569 F.3d 946, 952 (9th Cir. 2009). Both congressional mandate and Ninth Circuit law support
11 Twilio's argument that the FCC has the authority to interpret and enforce the TCPA as it relates to
12 text messages. Thus, to the extent plaintiff relies on FCC rulemaking to raise a claim as to text
13 messaging, it cannot simultaneously argue that the FCC cannot regulate companies that transmit
14 text messages or interpret the TCPA to find that a company like Twilio is not liable under the
15 TCPA.

16 Plaintiff also attacks the merits of the Club Texting petition, which raises the precise issues
17 that are presented by this case. Plaintiff argues that "[t]he FCC cannot exempt Club Texting," and
18 "Club Texting is effectively asking for an exemption under the guise of 'removing uncertainty'"
19 and "Club Texting is actually asking the FCC to supplant the word 'send' for the word 'make'"
20 and "Club Texting falls outside the FCC's rulemaking authority, and thus, the Court need not give
21 it deference." Opp. at 18-20. While plaintiff might disagree with the merits of Club Texting's
22 petition, his argument concedes that the petition raises the same issues presented in this action, and
23 that the FCC is poised to address those issues.

24 Third, rather than address the four factors that support application of the doctrine of
25 primary jurisdiction,⁵ plaintiff argues that he would be prejudiced by a stay or dismissal because

26 ⁵ The four factors courts generally evaluate to determine whether it is appropriate to apply the
27 doctrine of primary jurisdiction are: "(1) whether the question at issue is one within the
28 conventional experience of judges or whether it involves technical or policy considerations
within the agency's particular field of expertise; (2) whether the question at issue is particularly
REPLY IN SUPPORT OF TWILIO, INC.'S MOTION TO DISMISS
FIRST AMENDED CLASS ACTION COMPLAINT

1 Club Texting's petition to the FCC has been pending for two years and it is unknown when the
2 FCC will issue a rulemaking. Opp. at 24-25. The mere passage of time does not suffice as a legal
3 basis for declining to invoke primary jurisdiction. Nor does the mere passage of time, without
4 more, prejudice plaintiff. As the Supreme Court explained, courts are "obliged to defer" to an
5 agency where the "issue brought before a court is in the process of litigation through procedures
6 originating in the [agency]." *Fed. Power Commission v. Louisiana Power & Light Co.*, 406 U.S.
7 621, 647 (1972). Here, the FCC is already considering the precise issues raised by plaintiff in his
8 FAC through the petition filed by Club Texting. Thus, the Court is obliged to defer to the FCC's
9 exercise of primary jurisdiction. Primary jurisdiction is intended to enable a court to "determine
10 that the initial decision[-]making responsibility should be performed by the relevant agency rather
11 than the courts." *Syntek Semiconductor Co. v. Microchip Tech., Inc.*, 307 F.3d 775, 780 (9th Cir.
12 2002). Because the issue of whether TCPA liability falls on software platforms created by
13 companies like Twilio is one of first impression pending before the FCC, the matter should be
14 referred to that administrative body.

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26 within the agency's discretion; (3) whether there exists a substantial danger of inconsistent
27 ruling; and (4) whether a prior application to the agency has been made." *See United States v.*
28 *Dish Network, L.L.C.*, No. 09-3070, 2011 WL 475067, at *2 (C.D. Ill. Feb 4, 2011) (citing *Davel*
Commc'ns, Inc. v. Qwest Corp., 460 F.3d 1075, 1086-87 (9th Cir. 2006).

1 **IV. CONCLUSION**

2 For the foregoing reasons, Twilio respectfully requests this Court to grant its motion to
3 dismiss with prejudice the claims alleged against Twilio in plaintiff's FAC. In the alternative, the
4 Court should stay this proceeding and defer to the FCC under the doctrine of primary jurisdiction.
5

6 Dated: November 17, 2011

Respectfully submitted,

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8 By: /s/ Patrick S. Thompson

Patrick S. Thompson

pthompson@goodwinprocter.com

Anna Hsia

ahsia@goodwinprocter.com

Audrey M. Lin

alin@goodwinprocter.com

GOODWIN PROCTER LLP

Three Embarcadero Center, 24th Floor

San Francisco, California 94111

Tel.: 415.733.6000

Fax: 415.677.9041

14 *Attorneys for Defendant*

15 *Twilio, Inc., a Delaware Corporation*
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/s/ Patrick S. Thompson
Patrick S. Thompson